LIBRARY
SUPREME COURT, U. S.

FILED
FEB 17 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1050

SOUTHERN PACIFIC COMPANY,
a corporation,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California.

Jurisdictional Statement of Appellant Southern Pacific Company

ROBERT L. PIERCE
JOHN MACDONALD SMITH
ROBERT S. BOGASON
65 Market Street
San Francisco, Calif. 94105

Counsel for Appellant Southern Pacific Company

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	3
Statement of the Case	4
The Questions Are Substantial	5
Conclusion	8
Certificate of Service	9

TABLE OF CITATIONS

Cases	Pages
Bloom v. Illinois, 391 U.S. 194 (1968)	2, 6, 7
Bluefield Co. v. Pub. Serv. Comm., 262 U.S. 679 (1923)	2
Duncan v. Louisiana, 391 U.S. 145 (1968)	6, 7
Hibben v. Smith, 191 U.S. 310, 335 (1903)	6
Interstate Commerce Commission v. Brimson, 154 U.S. 447 (1894)	6, 7
Miller v. Schoene, 276 U.S. 272 (1928)	2
Constitution & Statutes	
California Code of Civil Procedure, § 1218	3, 4, 7
California Constitution	
Art. 12 § 22	2, 4, 5, 7
California Public Utilities Code	
Sections 1756-1770	5
Section 2113	2, 4, 5
28 U.S.C. § 1257 (2)	2
Other	
Advance California Reports, 69 A.C. No. 9, p. 1 of Minutes	2

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

SOUTHERN PACIFIC COMPANY,
a corporation,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California.

Jurisdictional Statement of Appellant Southern Pacific Company

OPINIONS BELOW

The unreported opinion and order of the Public Utilities Commission of the State of California (herein sometimes referred to as the "Commission") in Decision No. 74006 are dated April 16, 1968, and copies thereof are attached hereto as Appendix A. The final order of the Supreme Court of the State of California, in No. 22610 (attached hereto as Appendix B), reviewing such Commission order

is reported in the Advance California Reports, 69 A.C. No. 9, p. 1 of the Minutes.*

JURISDICTION

The order of the California Supreme Court, sought to be reviewed, was issued September 25, 1968. On December 20, 1968 appellant filed in the California Supreme Court a timely notice of appeal to the United States Supreme Court. Jurisdiction of this appeal is conferred on the United States Supreme Court by 28 U.S.C. § 1257 (2). Cases believed to sustain such jurisdiction include: *Bluefield Co. v. Pub. Serv. Comm.*, 262 U.S. 679 (1923); *Miller v. Schoene*, 276 U.S. 272 (1928); and *Bloom v. Illinois*, 391 U.S. 194 (1968).

STATUTES INVOLVED

1. Art. 12, § 22 of the California Constitution, attached as Appendix C, provides in pertinent part:

> "... the commission and each of the commissioners shall have the power to ... punish for contempt in the same manner and to the same extent as courts of record; ..."

2. § 2113, California Public Utilities Code provides:

> "Every public utility, corporation, or person which fails to comply with any part of any order, decision, rule, regulation, direction, demand, or requirement of the commission or any commissioner is in contempt of the commission, and is punishable by the commission for contempt in the same manner and to the same ex-

*Prior to February 11, 1969, all involved counsel for appellant were under the impression that the Rules of the Supreme Court required filing of this Jurisdictional Statement by February 18, 1969. For the first time counsel became aware on that date that by Rule 13, as revised, effective October 2, 1967, complete docketing of this appeal, including the filing of this statement, was required by December 24, 1968. Accordingly, counsel pray that their inadvertence and ignorance of the revision of Rule 13 be excused and that the docketing of this appeal be permitted by the Court.

tent as contempt is punished by courts of record. The remedy prescribed in this section does not bar or affect any other remedy prescribed in this part, but is cumulative and in addition thereto."

3. § 1218 California Code of Civil Procedure states:

"Upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars ($500), or he may be imprisoned not exceeding five days, or both; provided, however, that in justice courts the judge may punish by fine or imprisonment or both, such fine not to exceed, in any case, one hundred dollars ($100), and such imprisonment one day; the conviction, specifying particularly the offense, and the judgment thereon, must be entered in the docket."

QUESTIONS PRESENTED

The questions presented in the notice of appeal are as follows:

1. Can a state statute, consistent with the due process requirements of the Fourteenth Amendment to the Federal Constitution, authorize a state administrative agency to exercise judicial power to adjudge a party guilty of criminal contempt, and impose substantial criminal penalties pursuant to such conviction?

2. Can a state statute, consistent with the due process requirements of the Fourteenth Amendment to the Constitution of the United States, authorize a state administrative agency to exercise judicial power to convict a party of criminal contempt and impose substantial and serious criminal penalties, without affording the alleged contemner an opportunity for a trial by jury?

STATEMENT OF THE CASE

Appellant, a common carrier by railroad operating commuter passenger service between San Jose and San Francisco, California, sought to impose a parking fee on automobiles using public parking lots owned by it adjacent to its stations between those points. The Commission without a hearing issued a temporary restraining order on October 10, 1967, directing appellant to discontinue the parking charges pending investigation by the Commission. Appellant, believing the Commission was completely without jurisdiction to issue this order, sought a writ of prohibition from the California Supreme Court to enjoin it, but also refused to comply with the order. Pursuant to California constitutional and statutory provisions (Art. 12, § 22, California Constitution; § 2113, California Public Utilities Code), which permit the Commission to punish for contempt in the same manner and to the same extent as a court of record, and do not require a jury trial, the Commission then proceeded to hold a hearing without a jury before one of its members and one of its examiners to determine whether appellant was guilty of contempt.

On April 16, 1968 the Commission issued its involved decision and order (Appendix A) convicting appellant of 44 counts of contempt and concurrently imposing a fine of $22,000. Apparently the Commission levied the fine under § 1218, California Code of Civil Procedure, which permits a court to assess a fine of not in excess of $500 for the contempt. However, in assessing the fine the Commission treated the collection of the parking fee from an individual patron as a separate contempt, and determined the total fine by imposing a $500 fine upon each of 44 such instances selected by the Commission during the period when appel-

lant was awaiting a ruling from the California Supreme Court on its petition for a writ of prohibition.

Thereafter, pursuant to §§ 1756-1770, California Public Utilities Code, which sections provide the only method of reviewing a contempt conviction of the Commission, appellant filed a petition for a writ of review in the Supreme Court of the State of California. In that petition, appellant contended, *inter alia,* that Art. 12 § 22 of the California Constitution and § 2113, California Public Utilities Code, as construed to permit conviction of appellant of contempt by the Commission, contravened the Fourteenth Amendment of the United States Constitution in two respects by: (1) delegating contempt powers to an administrative agency; and (2) providing for a contempt conviction by such agency without affording appellant a trial by jury.

On September 25, 1968, the California Supreme Court issued its order, herein sought to be reviewed, summarily denying appellant's petition for a writ of review without an opinion, thus upholding the constitutionality of the questioned California constitutional and statutory provisions.

●

THE QUESTIONS ARE SUBSTANTIAL

Both questions raise substantial federal constitutional issues. The first question presented, whether the power to punish for criminal contempt may be conferred on a state administrative agency, is novel. However, we submit that under the spirit of decisions of this Court, including two handed down only last year, the California Supreme Court clearly erred in its holding with respect to such question. Furthermore, we submit that under the actual holdings of these latter two decisions, the California Supreme Court was also wrong in its conclusion on the second question, that a jury trial was not required in connection with con-

viction of a criminal contempt of an administrative agency involving a serious penalty.

Seventy-five years ago in *Interstate Commerce Commission v. Brimson,* 154 U.S. 447 (1894), this Court recognized that the due process requirements of the Fifth Amendment are violated when a federal administrative agency is delegated power to punish for contempt. The court stated (154 U.S. at 485):

> "Such a body [a federal administrative agency] could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment."

This Court has also long recognized that, in general, the Fourteenth Amendment carries the same limitations on arbitrary state legislation which the Fifth Amendment imposes with respect to federal action. Thus, in *Hibben v. Smith,* 191 U.S. 310, 325 (1903), the Court declared:

> "The Fourteenth Amendment, it has been held, legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the Fifth Amendment against similar legislation by Congress; . . . ."

Furthermore, in recent years this Court has extended more and more of the specific protections under the Federal Bill of Rights to state action by virtue of the Fourteenth Amendment. This process culminated in the decisions last term in *Bloom v. Illinois,* 391 U.S. 194 (1968) and *Duncan v. Louisiana,* 391 U.S. 145 (1968). These cases recognize that at the state level due process under the Fourteenth Amendment requires a jury trial in contempt cases, and other serious crimes, but does not require trial by jury

where the alleged offense may be classified as a "petty crime."

As to the first question, in view of the facts that, under the *Bloom* case, state contempt proceedings are to be measured by due process standards and that due process under the *Brimson* case precludes the delegation of contempt powers to a federal administrative agency, a state should be *a fortiori* prohibited from delegating contempt powers to one of its administrative bodies. This conclusion follows even more strongly in view of the fact that state administrative agencies are customarily more political in nature and less quasi-judicial in their approach than federal administrative tribunals, being more often made up of shorter term, non-lawyer, elective, rather than appointive, officials, who generally receive lower salaries.[1]

As to the second question, the *Bloom* and *Duncan* decisions, which definitely require a jury in full fledged contempt and criminal proceedings before a state court, should even more clearly demand a jury trial in criminal contempt proceedings before a state administrative body. This is, of course, assuming that the administrative body imposed a sufficiently substantial criminal penalty to bring the matter out of the petty offense exception recognized in those cases. Here, we submit the fine imposed, $22,000, was sufficiently substantial. Although the $500 fine permitted by § 1218, California Code of Civil Procedure, for a contempt is perhaps not substantial on its face, the California Supreme Court approved the arbitrary construction placed by the Commission on that section as permitting it to consider

1. While, as indicated, in Art. 12, § 22 of the California Constitution (Appendix C), the California Public Utilities Commission is appointive, the term is only for six years. During the period of this case only one of the five members of that Commission was a lawyer, the Commissioner who presided at the contempt hearing.

that it was not faced with what was in reality at most but a single act of contempt, refusal to obey the Commission's order, but rather with 44 separate acts of contempt, selected chargings of the involved parking fee to various motorists. In this fashion, by multiplying $500 by 44, the Commission, as previously indicated, arrived at the very substantial $22,000 fine. On the same theory, since the same parking fee was assessed by appellant against hundreds of other motorists during this period, the Commission could have with impunity just as well have assessed a tremendous fine and imprisoned officers of appellant for five days for each individual car that a parking fee was collected.

CONCLUSION

For the foregoing reasons the Court should note jurisdiction of this appeal and set the substantial federal constitutional issues raised for formal argument.

Respectfully submitted,

ROBERT L. PIERCE
JOHN MACDONALD SMITH
ROBERT S. BOGASON

By ROBERT L. PIERCE

Counsel for Appellant Southern Pacific Company

CERTIFICATE OF SERVICE

I, ROBERT L. PIERCE, one of the attorneys for SOUTHERN PACIFIC COMPANY, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify, pursuant to Rule 33(3)(b) of the Revised Rules of the Supreme Court of the United States, that on the 14th day of February, 1969, I served a copy of the foregoing Jurisdictional Statement to the Supreme Court of the United States as follows:

On all counsel of record for the CALIFORNIA PUBLIC UTILITIES COMMISSION, by mailing a copy, in a duly addressed envelope, first class, postage prepaid, to said counsel at their post office address, 5072 State Building, San Francisco, California 94102.

Dated at San Francisco, California, this 14th day of February, 1969.

ROBERT L. PIERCE

Attorney for
Southern Pacific Company

65 Market Street
San Francisco, Calif. 94105

(Appendices Follow)

Appendix A

Decision No. 74006

Before the Public Utilities Commission of the State of California

City of San Carlos, a Municipal corporation, *Complainant,* vs. Southern Pacific Company, a corporation, *Defendant.*	Case No. 8697 (Filed October 10, 1967)
Investigation on the Commission's own motion into the Rates, Charges, Rules, Operations, Practices, Contracts, Leases, Service and Facilities of all the vehicular parking areas adjacent to railroad stations between San Francisco and San Jose, California, owned or controlled by Southern Pacific Company.	Case No. 8700 (Filed October 10, 1967)

CONTEMPT PROCEEDING

Alan C. Furth and *John MacDonald Smith,* for Southern Pacific Company, respondent.

Richard D. Gravelle, Counsel for the Commission staff.

OPINION

On November 15, 1967, the Commission issued an order requiring Southern Pacific Company to appear and show cause, if any it had, why it should not be adjudged to be in contempt of the Commission for failing to comply with

certain provisions of a Commission order dated October 10, 1967, as amended by Decision No. 73251 dated October 24, 1967.

Public hearing on the Order to Show Cause was held on November 30, 1967 and December 21, 1967, at San Francisco, with the matter being submitted on the latter date.

The record indicates that by its order dated October 10, 1967, the Commission instituted an investigation into the operations of all vehicular parking areas adjacent to the railroad stations between San Francisco and San Jose, California, owned or controlled by Southern Pacific Company to determine the reasonableness of parking charges recently imposed or about to be imposed by Southern Pacific Company. Pending such investigation the order restrained Southern Pacific Company from charging or collecting parking tolls at any of its parking areas, adjacent to its tracks, between San Francisco and San Jose. By Decision No. 73251, dated October 24, 1967, following oral argument, the restraining order was modified by excluding therefrom the parking areas located at San Francisco and Mountain View; however, Southern Pacific Company was ordered to charge no more than 25 cents at the Mountain View lot. Decision No. 73251 also required respondent to remove or cover all rental signs and rental equipment from the parking areas made subject to the restraining order as amended.

The order of October 10, 1967, was served upon respondent by registered mail on October 12, 1967, and became effective on November 1, 1967. A copy of Decision No. 73251 was served upon respondent by registered mail on October 27, 1967, and the order became effective on October 30, 1967.

An affidavit in support of the Order to Show Cause was prepared by an employee of the Commission and was introduced as a part of Exhibit C-1. It was his testimony that he visited the parking areas herein considered on November 2, 3, 6, 7 and 8, 1967, and personally observed 44 separate and distinct violations of the Commission's restraining order, as amended. The witness testified that he personally purchased parking lot tickets and observed others purchasing tickets at the various lots. He further testified that respondent had failed to cover the rental signs and rental equipment at said parking areas. The witness also testified that he observed individuals paying 35 cents for parking lot tickets at the Mountain View area.

Respondent made no affirmative showing, but its President appeared pursuant to a subpoena and testified that upon being advised by counsel that the Commission's restraining order was invalid he personally made the decision on behalf of respondent not to comply with said order and that respondent continued its program of collecting parking fees notwithstanding the Commission's order to the contrary.

The record further indicates that the State Supreme Court of the State of California took the following course of action with respect to petitions and an application filed by respondent as a result of the Commission's restraining order:

(1) November 8, 1967, denied respondent's petition for a writ of prohibition.

(2) November 29, 1967, denied respondent's petition for a writ of prohibition and application for a stay of the Commission's restraining order.

(3) December 20, 1967, denied respondent's petition for a writ of review of the Commission's restraining order.

Findings

The Commission finds as follows:

1. Southern Pacific Company is a public utility "railroad corporation" within the meaning of Section 230 of the Public Utilities Code and subject to the jurisdiction of this Commission.

2. On October 10, 1967, this Commission issued an order restraining Southern Pacific Company from charging or collecting parking tolls at any of its parking areas adjacent to its tracks between San Francisco and San Jose pending further order of the Commission. A copy of said order was served upon Southern Pacific Company by registered mail on October 12, 1967, and became effective on November 1, 1967.

3. By Decision No. 73251, dated October 24, 1967, the Commission amended its order of October 10, 1967 and deleted therefrom the parking areas located at San Francisco and Mountain View, and in addition limited the parking charge at Mountain View to 25 cents. Said decision also required Southern Pacific Company to remove or cover all rental signs and rental equipment. A copy of Decision No. 73251 was served upon Southern Pacific Company by registered mail on October 27, 1967, and the order became effective on October 30, 1967.

4. On November 2, 3, 6, 7 and 8, 1967, an employee of the Commission visited the parking areas covered by the Commission's restraining order and personally observed 44 separate instances wherein Southern Pacific Company had failed to comply with the Commission's restraining order dated October 10, 1967, as amended by Decision No. 73251.

5. On November 15, 1967, the Commission by Decision No. 73352 issued an order requiring Southern Pacific Company to appear before Commissioner Bennett or Examiner

Daly on November 30, 1967, at the Commission's Courtroom in San Francisco and then and there show cause, if any it had, why it should not be adjudged to be in contempt of this Commission and punished therefor in the manner prescribed by law for the 44 separate and distinct offenses of alleged contempt set forth in the affidavit attached to the Order to Show Cause. A copy of said Order to Show Cause and copies of documents in support thereof were personally served upon an officer of Southern Pacific Company on November 15, 1967.

6. During the course of hearing upon the Order to Show Cause the President of Southern Pacific Company admitted that he was fully aware of the restraining order of the Commission, understood the content and nature thereof, but personally decided on behalf of Southern Pacific Company, not to comply with said order and that said company did in fact collect and continue to collect, as of December 21, 1967, parking charges at the parking areas covered by the Commission's restraining order of October 10, 1967, as amended.

7. Southern Pacific Company at all the times mentioned herein did not, and now does not, specify rates and charges in its schedules filed with the Commission and in effect at such times applicable to the parking charges collected by it at the parking areas covered by the Commission's restraining order of October 10, 1967, as amended; nor was Southern Pacific Company during any of such times authorized by the Commission to assess and collect such charges.

8. The restraining order of October 10, 1967, as amended, has been in effect at all times since November 1, 1967.

9. The Supreme Court of the State of California on three separate occasions since November 8, 1967 has denied to Southern Pacific Company writs of prohibition and re-

view and an application for a stay of the Commission's order of October 10, 1967, as amended.

10. Southern Pacific Company willfully, intentionally and flagrantly failed to comply with the Commission's restraining order of October 10, 1967, as amended, on the 44 separate and distinct instances as set forth in the affidavit in support of the Order to Show Cause in Exhibit C-1 of this proceeding.

Conclusions

1. Southern Pacific Company in willfully and intentionally failing to comply with the Commission's restraining order of October 10, 1967, as amended, on the 44 separate and distinct instances referred to in Finding 10 above is in contempt of the Commission.

2. Southern Pacific Company should be fined the sum of $500 for each of such 44 instances, in the total amount of $22,000, in the manner set forth in the following order.

3. Southern Pacific Company should be directed to formulate and file a plan with the Commission to refund all moneys collected by it as parking charges at the parking areas here involved from November 2, 1967 to the effective date of this order.

A recommended decision was presented to the Commission by Commissioner Bennett. Some revisions were made therein by the Commission, including an additional finding, conclusion and ordering paragraphs. In order that such recommended decision may be available to the parties, a copy thereof is attached hereto (Attachment "A").

ORDER

It is ordered that:

1. Southern Pacific Company is hereby adjudged to be in contempt of the Commission's restraining order dated October 10, 1967, as amended by Decision No. 73251 for

failing to comply therewith on the 44 separate and distinct occasions as set forth in the affidavit in support of the Order to Show Cause as evidenced by Exhibit C-1 in this proceeding.

2. Southern Pacific Company, within ten days of the effective date hereof, shall formulate and file with the Commission a plan whereby it will refund parking charges to those persons from whom Southern Pacific Company, without authority from the Commission, collected them in connection with the parking areas named in the order of October 10, 1967, as amended. Such plan shall provide, among other things, that claimants for refunds shall have a period of ninety days, from May 7, 1968, the date upon which Southern Pacific Company shall cause to be published and posted a "Notice of Refund" in an appropriate place, to establish and file their claims.

3. Southern Pacific Company shall pay to the Commission a fine in the amount of $22,000. Such sums as Southern Pacific Company shall pay out, pursuant to a plan referred to in paragraph 2 hereof and which plan will have been approved by the Commission, shall be credited against said fine. The entire amount of the fine remaining unpaid shall in any event be paid within ten days after the expiration of the ninety day period hereinabove mentioned.

The Secretary of the Commission shall cause a copy of this order to be personally served upon Southern Pacific Company and the effective date of this order shall be twenty days after such service.

Dated at San Francisco, California, this 16th day of April, 1968.

PETER E. MITCHELL
President
WILLIAM SYMONS, JR.
FRED P. MORRISSEY
Commissioners

Attachment "A"

Decision No. .....

Before the Public Utilities Commission of the State of California

City of San Carlos, a Municipal corporation, *Complainant,* vs. Southern Pacific Company, a corporation, *Defendant.*	Case No. 8697 (Filed October 10, 1967)
Investigation on the Commission's own motion into the Rates, Charges, Rules, Operations, Practices, Contracts, Leases, Service and Facilities of all the vehicular parking areas adjacent to railroad stations between San Francisco and San Jose, California, owned or controlled by Southern Pacific Company.	Case No. 8700 (Filed October 10, 1967)

CONTEMPT PROCEEDING

Alan C. Furth and *John MacDonald Smith*, for Southern Pacific Company, respondent.

Richard D. Gravelle, Counsel for the Commission staff.

OPINION

On November 15, 1967, the Commission issued an order requiring Southern Pacific Company to appear and show cause, if any it had, why it should not be adjudged to be in contempt of the Commission for failing to comply with certain provisions of a Commission order dated October

10, 1967, as amended by Decision No. 73251 dated October 24, 1967.

Public hearing on the Order to Show Cause was held before Commissioner Bennett and Examiner Daly on November 30, 1967 and December 21, 1967, at San Francisco, with the matter being submitted on the latter date.

The record indicates that by its order dated October 10, 1967, the Commission instituted an investigation into the operations of all vehicular parking areas adjacent to the railroad stations between San Francisco and San Jose, California, owned or controlled by Southern Pacific Company to determine the reasonableness of parking charges recently imposed or about to be imposed by Southern Pacific Company. Pending such investigation the order restrained Southern Pacific Company from charging or collecting parking tolls at any of its parking areas, adjacent to its tracks, between San Francisco and San Jose. By Decision No. 73251, dated October 24, 1967, following oral argument, the restraining order was modified by excluding therefrom the parking areas located at San Francisco and Mountain View; however, Southern Pacific Company was ordered to charge no more than 25 cents at the Mountain View lot. Decision No. 73251 also required respondent to remove or cover all rental signs and rental equipment from the parking areas made subject to the restraining order as amended.

The order of October 10, 1967, was served upon respondent by registered mail on October 12, 1967, and became effective on November 1, 1967. A copy of Decision No. 73251 was served upon respondent by registered mail on October 27, 1967, and the order became effective on October 30, 1967.

An affidavit in support of the Order to Show Cause was prepared by an employee of the Commission and was intro-

duced as a part of Exhibit C-1. It was his testimony that he visited the parking areas herein considered on November 2, 3, 6, 7 and 8, 1967, and personally observed 44 separate and distinct violations of the Commission's restraining order, as amended. The witness testified that he personally purchased parking lot tickets and observed others purchasing tickets at the various lots. He further testified that respondent had failed to cover the rental signs and rental equipment at said parking areas. The witness also testified that he observed individuals paying 35 cents for parking lot tickets at the Mountain View area.

Respondent made no affirmative showing, but its President appeared pursuant to a subpoena and testified that upon being advised by counsel that the Commission's restraining order was invalid he personally made the decision on behalf of respondent not to comply with said order and that respondent continued its program of collecting parking fees notwithstanding the Commission's order to the contrary.

The record further indicates that the State Supreme Court of the State of California took the following course of action with respect to petitions and an application filed by respondent as a result of the Commission's restraining order:

(1) November 8, 1967, denied respondent's petition for a writ of prohibition.

(2) November 29, 1967, denied respondent's petition for a writ of prohibition and application for a stay of the Commission's restraining order.

(3) December 20, 1967, denied respondent's petition for a writ of review of the Commission's restraining order.

Findings

After consideration the Commission finds as follows:

1. Southern Pacific Company is a public utility "railroad corporation" within the meaning of Section 230 of the Public Utilities Code and subject to the jurisdiction of this Commission.

2. On October 10, 1967, this Commission issued an order restraining Southern Pacific Company from charging or collecting parking tolls at any of its parking areas adjacent to its tracks between San Francisco and San Jose pending further order of the Commission. A copy of said order was served upon Southern Pacific Company by registered mail on October 12, 1967, and became effective on November 1, 1967.

3. By Decision No. 73251, dated October 24, 1967, the Commission amended its order of October 10, 1967 and deleted therefrom the parking areas located at San Francisco and Mountain View, and in addition limited the parking charge at Mountain View to 25 cents. Said decision also required Southern Pacific Company to remove or cover all rental signs and rental equipment. A copy of Decision No. 73251 was served upon Southern Pacific Company by registered mail on October 27, 1967, and the order became effective on October 30, 1967.

4. On November 2, 3, 6, 7 and 8, 1967, an employee of the Commission visited the parking areas covered by the Commission's restraining order and personally observed 44 separate instances wherein Southern Pacific Company had failed to comply with the Commission's restraining order dated October 10, 1967, as amended by Decision No. 73251.

5. On November 15, 1967, the Commission by Decision No. 73352 issued an order requiring Southern Pacific Com-

pany to appear before Commissioner Bennett or Examiner Daly on November 30, 1967, at the Commission's Courtroom in San Francisco and then and there show cause, if any it had, why it should not be adjudged to be in contempt of this Commission and punished therefor in the manner prescribed by law for the 44 separate and distinct offenses of alleged contempt set forth in the affidavit attached to the Order to Show Cause. A copy of said Order to Show Cause and copies of documents in support thereof were personally served upon an officer of Southern Pacific Company on November 15, 1967.

6. During the course of hearing upon the Order to Show Cause the President of Southern Pacific Company admitted that he was fully aware of the restraining order of the Commission, understood the content and nature thereof, but personally decided on behalf of Southern Pacific Company, not to comply with said order and that said company did in fact collect and continue to collect, as of December 21, 1967, parking charges at the parking areas covered by the Commission's restraining order of October 10, 1967, as amended.

7. The restraining order of October 10, 1967, as amended, has been in effect at all times since November 1, 1967.

8. The Supreme Court of the State of California on three separate occasions since November 8, 1967 has denied to Southern Pacific Company writs of prohibition and review and an application for a stay of the Commission's order of October 10, 1967, as amended.

Conclusion

Southern Pacific Company willfully, intentionally and flagrantly failed to comply with the Commission's restrain-

ing order of October 10, 1967, as amended, on the 44 separate and distinct instances as set forth in the affidavit in support of the Order to Show Cause in Exhibit C-1 of this proceeding.

During the course of hearing Southern Pacific Company filed a petition to disqualify Commissioner Bennett. The Commission denied the petition, but the denial will be affirmed in the ensuing order.

ORDER

It is ordered that:

1. Southern Pacific Company is hereby adjudged to be in contempt of the Commission's restraining order dated October 10, 1967, as amended by Decision No. 73251 for failing to comply therewith on the 44 separate and distinct occasions as set forth in the affidavit in support of the Order to Show Cause as evidenced by Exhibit C-1 in this proceeding and within ten days after the effective date of this order shall pay to this Commission a fine in the amount of twenty-two thousand dollars ($22,000).

2. The petition of Southern Pacific Company to disqualify Commissioner William M. Bennett is hereby denied.

The Secretary of the Commission shall cause a copy of this order to be personally served upon Southern Pacific Company and the effective date of this order shall be twenty days after such service.

Dated at ....., California, this ..... day of ....., 1968.

Commissioner Gatov Dissenting:

It is my opinon that Southern Pacific Company wilfully and intentionally failed to comply with the Commission's Restraining Order of October 10, 1967 (as amended) on

forty-four separate and distinct instances, and is in contempt of the Commission.

Further, it is my opinion that Southern Pacific Company should be fined in the sum of $500.00 for each of the forty-four instances, or a total amount of $22,000.00.

I do not concur in the order of the majority of the Commission in this case.

/s/ A. W. Gatov
Commissioner

Dated: San Francisco, California,
April 16, 1968

William M. Bennett, Commissioner, Dissenting Opinion

This case had its genesis in proceedings before this Commission concerned with establishing a reasonable fee applicable to Peninsula parking lots owned and operated by the Southern Pacific Company. On November 6, 1967, counsel for Southern Pacific in public hearing before this Commission in Case 8697 was candid in stating on the record that the Southern Pacific Company would not comply with a restraining order previously issued by this Commission on October 10, 1967, and signed by Commissioners Mitchell, Gatov and Symons. Southern Pacific took the position at that time and even during the proceedings herein that the restraining order of the Commission was invalid. Even repeated refusals by the Supreme Court of the State of California to nullify such order was disregarded by the Southern Pacific.

The refusal of the Southern Pacific Company was so notorious that undoubtedly this explains the failure of that company to present any testimony whatsoever by way of a defense to the proceedings initiated or by way of mitigation for its contemptuous action. Southern Pacific conducted

itself with an air of certainty almost as though it had suddenly become immune to the jurisdiction and process of this Commission.

But for the candor of Southern Pacific counsel in freely admitting to violation of the Commission's orders, this matter would not have come to the Commission. It is most curious, perplexing and beyond explanation that neither the staff of this Commission, the Director of Transportation nor the Chief Counsel brought to our attention the disregard by Southern Pacific of a Commission order. Only the frankness of Southern Pacific counsel in the public proceedings apprised us that a lawful order of the Commission was being disobeyed. This is hardly in keeping with the concept of a vigorous, independent staff acting in the public interest. And it is so unlike staff action of recent years when it did exhibit initiative, independence and simply performed statutory duty. We can well ask why staff personnel knowing of Southern Pacific's disregard for a Commission order chose to remain silent. I think it correct to state that but for the information supplied by Southern Pacific counsel as to the railroad's disregard for a lawful order that there never would have been knowledge of contempt let alone proceedings to impose punishment for contempt.

That the Southern Pacific Company considers itself beyond the reach of this Commission and the Supreme Court of this state is plain. It makes its own determination as to that which is binding upon it and obeys or disobeys accordingly.

The interests of its commuters, the authority of this Commission, the public service obligations of this corporation, all are seemingly of little or no concern to the management of Southern Pacific Company. This corporation should realize as should all other California public utilities

that if regulation is to be ignored, if a permissive regulatory climate is to inhibit the vigor of this Commission, then the public will not be served or protected by this Commission, and the raison d'etre for its being will be gone. And when the public realization becomes widespread and if the historical process repeats itself then the only answer toward control of a public service corporation as here lies in public ownership. And shortsighted management enraptured with profit and indifferent to public need can only hasten that day.

The convenient story of the President of Southern Pacific that he believed counsel's advice that the restraining order was not valid discloses a woeful inadequacy upon the part of Southern Pacific counsel and Southern Pacific management. Obviously this was the testimony that had to be given. Merely giving it does not make it credible. Southern Pacific was here testing the Commission and almost got away with it. The difficulty was however that the contempt was so open and flagrant that it could not be disregarded. The distressing thing here is the spectacle of management totally callous toward public responsibilities and indifferent to the obligations of law.

Some comments are in order. The order of my brethren ruling upon my qualifications is irrelevant, unnecessary and beyond their power. As a Commissioner I take my authority from the constitution—not from my colleagues. Further, I had thought that the California Supreme Court had clearly determined this matter when they denied the efforts of the Southern Pacific Company to disqualify me from the case.

Concerning the parking lot decision the majority embarks upon a most curious discussion concerning the tax liability of California railroads. The record is quite clear that

Southern Pacific has a tax expense associated with each parking lot which is the subject of today's order. Heretofore the Commission has always recognized that a public utility whether it be a railroad corporation or other is entitled in the rate fixing process to compensation for taxes paid. And further in the parking lot decision in this Commission dated June 20, 1967, Decision No. 72615 the majority which is now reversing itself found specifically that SP is entitled to recoup *taxes,* assessments, improvements and maintenance of parking lots. Not only is the Commission disregarding its recently enunciated parking lot order but it is disregarding all of the regulatory concepts which heretofore have been considered well established, as part of the rate fixing process of this Commission. We are prompted to wonder why. Today's order insofar as it relates to the parking lots merely sets aside the decision of an impartial examiner who heard the fresh testimony and who judged the credibility of witnesses and the majority arbitrarily rewrites the decision. In seeking to reach some unformulated goal or objective the majority of necessity does violence to basic regulatory principles and law. Does the majority actually hold by this decision that there is question as to whether taxes are an operating expense in a rate proceeding? So far as the staff position is concerned there is no evidence whatsoever from the staff rebutting in any wise the hard fact that Southern Pacific has a tax liability upon each parking lot.

Turning to the contempt proceeding the Commission has mixed two cases terribly. There is nothing whatsoever even by employment of the single word "refund"—about refunds in the contempt case. The opinion in the contempt case which is judicial in nature is supposed to be based upon the order to show cause, the allegations of contempt associ-

ated therewith and only the evidence pertaining to these matters adduced at public hearing. There is nothing in the contempt proceedings about refunds and therefore it is improper for the Commission to be mixing parking charges, refunds, and a punitive fine in one composite order. The staff has advised us that the contempt order is erroneous in presenting for the first time and in the ultimate majority decision discussion of refunds.

There is, however, a sly benefit to the Southern Pacific by the intrusion of the irrelevancy of refunds. Southern Pacific well knows that refunds are not part of a contempt order. And all today's majority order does is to defer and to place in doubt a specific fine of $22,000. Southern Pacific is required to set up some type of plan detailing the manner in which it shall refund parking charges. And the logical question arises at this point whether or not Southern Pacific is to base a refund plan upon Examiner Daly's original decision which provides for a 35 cent daily parking charge or whether the refund plan is to be based upon the majority's tentative daily charge of 25 cents. Standing plain in all of this is the fact that the 25 cent daily charge of the majority is not final in that the majority parking lot decision sets the matter down for further testimony to decide the tax issue and upon resolution of that issue conceivably the parking lot charge will, unless we abandon all past regulatory precedent, revert to the 35 cent charge which includes taxes as proposed by the examiner herein originally.

There is nothing in the majority order which covers the period of refunds by way of termination and all today's majority orders do is to defer any real decision either on parking lot charges or by way of imposing a $22,000 fine now for perhaps the most flagrant contempt ever visited

upon this body. Further, the confusion contained in today's contempt order whether deliberate and calculated by way of deliberate error to constitute reversal error on an appeal or whether coming from lack of expertise in the regulatory field has the same end result. And that end result is that nothing is being done to Southern Pacific. The Commission has given the Southern Pacific a beautiful error as the basis for rehearing—indeed the majority being placed upon notice of the deliberate error were quick to point out that Southern Pacific could ask for a rehearing.

One wonders whether or not the contempt order as it has been doctored and diluted by the extraneous element of refunds and as it has been rewritten has in fact given the Southern Pacific due process. My brethren do not seem to realize that contempt is a judicial proceeding and because of the penalties involved rights are to be scrupulously observed. The handling of today's orders is unique. Apparently now parties before us are to be treated to the copycat decision. And the Commission at least to its credit advertises the pure results of an impartial examiner and then illustrates its absolute power by arbitrarily assigning a decision to an examiner who never heard a line of testimony and to a commissioner who did not set on even one day's hearing. Southern Pacific is to be congratulated. A friendly Commission can achieve its ends either by an outright bold favor or if they be too much for public consumption then it can write a decision and place in it very carefully and deliberately a finding and a procedure here concerning refunds which constitutes in my opinion the basis of a successful appeal. Better then a friend of the court utilities now are served by friends at the court.

The decisions proposed by Examiner Daly were the ones which should be signed. In short, Southern Pacific should be

ordered to pay and at once a $22,000 fine. Their contempt was notorious, flagrant, self-serving and illustrative of a consistent public be damned attitude. As to the parking lot charges if the Commission does not know that since 1912 we have allowed taxes as an operating expense, they are free to wend their way through that concept and to arrive inevitably at the result contained in the examiner's original report. Southern Pacific today by the gentle treatment accorded them now has a license to be indifferent, arrogant and, if necessary, contemptuous.

/s/ WILLIAM M. BENNETT
Commissioner

Dated: San Francisco, California
April 16, 1968

Appendix B

ORDER DENYING WRIT OF REVIEW

S.F. No. 22610

In the Supreme Court of the State of California

In Bank

Southern Pacific Company

v.

Public Utilities Commission

Petition for writ of review DENIED.

Filed Sep 25 1968 William I. Sullivan, Clerk

By JSR

S.F. Deputy

TRAYNOR

Chief Justice

Appendix C

California Constitution

Art. 12 § 22. Public utilities commission; commissioners; rates; regulation of utilities; delegation of legislative power

Sec. 22. The Railroad Commission is continued in existence as the Public Utilities Commission, which shall consist of five members. The commission shall be appointed by the Governor from the State at large; provided, that the Legislature, in its discretion, may divide the State into districts for the purpose of such appointments, said districts to be as nearly equal in population as practicable; and provided further that the three commissioners in office at the time this section takes effect shall serve out the term for which they were elected, and that two additional commissioners shall be appointed by the Governor immediately after the adoption of this section, to hold office during the same term. Upon the expiration of said term, the term of office of each commissioner thereafter shall be six years, except the commissioners first appointed hereunder after such expiration, one of whom shall be appointed to hold office until January 1, 1917, two until January 1, 1919, and two until January 1, 1921. Whenever a vacancy in the office of commissioner shall occur, the Governor shall forthwith appoint a qualified person to fill the same for the unexpired term. Every appointment made by the Governor to the commission shall be subject to the advice and consent of a majority of the members elected to the Senate, except that if a vacancy occurs when the Legislature is not in session, the Governor may issue an interim commission which shall expire on the last day

of the next regular or special session of the Legislature. Commissioners appointed for regular terms shall, at the beginning of the term for which they are appointed, and those appointed to fill vacancies, shall, immediately upon their appointment, enter upon the duties of their offices. The Legislature shall fix the salaries of the Commissioners, but pending such action the salaries of the commissioners, their officers and employees shall remain as now fixed by law. The Legislature shall have the power, by a two-thirds vote of all members elected to each house, to remove any one or more of said commissioners from office for dereliction of duty or corruption or incompetency. All of said commissioners shall be qualified electors of this State, and no person in the employ of or holding any official relation to any person, firm or corporation, which said person, firm or corporation is subject to regulation by said Public Utilities Commission and no person owning stock or bonds of any such corporation or who is in any manner pecuniarily interested therein, shall be appointed to or hold the office of Public Utilities Commissioner. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission. The act of a majority of the commissioners when in session as a board shall be deemed to be the act of the commission; but any investigation, inquiry or hearing which the commission has power to undertake or to hold may be undertaken or held by or before any commissioner designated for the purpose by the commission, and every order made by a commissioner so designated, pursuant to such inquiry, investigation or hearing, when approved or confirmed by the commission and ordered filed in its office, shall be deemed to be the order of the commission.

Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission than the rates, fares and charges which are specified in such tariff. The commission shall have the further power to examine books, records and papers of all railroad and other transportation companies; to hear and determine complaints against railroad and other transportation companies; to issue subpenas and all necessary process and send for persons and papers; and *the commission and each of the commissioners shall have the power to* administer oaths, take testimony and *punish for contempt in the same manner and to the same extent as courts of record;* the commission may prescribe a uniform system of accounts to be kept by all railroad and other transportation companies.

No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Public Utilities Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Public Utilities Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution.

The provisions of this section shall not be construed to repeal in whole or in part any existing law not inconsistent herewith, and the "Railroad Commission Act" of this State

approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently herewith. And the said act shall have the same force and effect as if the same had been passed after the adoption of this provision of the Constitution and of all other provisions adopted concurrently herewith, except that the three commissioners referred to in said act shall be held and construed to be the five commissioners provided for herein.

Whenever in this Constitution or the laws of this State "Railroad Commission" is used, it shall be deemed to refer to the Public Utilities Commission. (Emphasis supplied).

LIBRARY
SUPREME COURT. U. S.

Office Supreme Court, U.S.
FILED
MAR 13 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1050

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California

Motion to Dismiss or Affirm

MARY MORAN PAJALICH
RODERICK B. CASSIDY
TIMOTHY E. TREACY
JAMES A. BLUMBERG
5072 State Building
San Francisco, California 94102
Attorneys for Appellee The Public Utilities Commission of the State of California

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	3
Statement of the Case	3
Argument	5
Conclusion	12
Appendix A	

TABLE OF AUTHORITIES CITED

Cases	Pages
Bloom v. Illinois, 391 U.S. 194 (1968)	6, 7, 9, 12
Brotherhood of Loc. Fire & Eng. v. Bangor & Aroostook R. Co., 380 F.2d 570 (1967)	10
Carfer v. Caldwell, 200 U.S. 293 (1906)	8
Consolidated Rendering Co. v. Vermont, 207 U.S. 541 (1908)	8
De Stefano v. Woods, 392 U.S. 631, 20 L.Ed.2d 1308 (June 17, 1968)	6
Duncan v. Louisiana, 391 U.S. 145 (1968)	12
Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911)	10
Interstate Commerce Commission v. Brimson, 154 U.S. 447 (1894)	7, 8, 9
In re Bruns, 15 Cal.App.2d 1, (1936)	11
In re Morris, 194 Cal. 63 (1924)	10, 11
In re Victor, 220 Cal. 729 (1934)	8
McCrone v. United States, 307 U.S. 61 (1939)	10
National Labor Relations Board v. Warren Co., 350 U.S. 107 (1955)	7
Parker v. United States, 153 F.2d 66 (1946)	10
United States v. United Mine Workers, 330 U.S. 258 (1946)	10
Van Hoosear v. Railroad Comm., 189 Cal. 228 (1922)	8

Statutes	
28 U.S.C. § 1257(2)	2
California Public Utilities Code:	
§ 312	8
§ 2104	12
§ 2105	8
§ 2106	8
§ 2110	12
§ 2113	2, 4, 8

Pages

California Code of Civil Procedure:
§ 1209 11
§ 1218 ..... 2, 11
California Government Code, § 18852 9
California Penal Code, § 166 11

CONSTITUTION

California Constitution, Art. 12, Section 22 ..... 2, 4, 8

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1050

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California

Motion to Dismiss or Affirm

OPINIONS BELOW

The Opinion and Order of the Public Utilities Commission of the State of California ("Commission") in Decision No. 74006 are dated April 16, 1968. Copies thereof are printed in Appendix A of appellant's Jurisdictional Statement. The final order of the Supreme Court of the State of California, S.F. No. 22610, issued September 25, 1968, which reviewed the Commission's Order, is reported in the Advance California Reports, 69 A.C. No. 9, page 1 of the Minutes, and is printed in Appendix B of appellant's Jurisdictional Statement. Notice of Appeal was timely filed December 20, 1968.

JURISDICTION

Appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(2). As stated above, Notice of Appeal was timely filed, but appellant has failed to docket the case in accordance with Rule 13 of the Rules of this Court. Appellant's Jurisdictional Statement was docketed on February 17, 1969, more than ninety days after the entry of judgment by the California Supreme Court on September 25, 1968. The period for docketing the case has not been extended by a Justice of this Court, nor has application been made for such an extension of time within the period sought to be extended (Rule 34, paragraph 2).

Counsel for appellant claim that they were unaware that "complete docketing of this appeal . . . was required by December 24, 1968" under the provisions of Rule 13, as revised, effective October 2, 1967. (Juris. Stat. p. 2 footnote.) However, under Rule 13, prior to the 1967 revisions, it was appellant's duty to docket the case not more than *sixty* days after the Notice of Appeal has been filed. Thus, the period within which to docket the case was shorter under the old rule than under the new.

Counsel do not claim ignorance of the prior rules. They do not explain their failure to comply with the present rules. The Jurisdictional Statement was not timely filed and the appeal should be dismissed.

STATUTES INVOLVED

Certain of the statutes involved are set forth at pages 2-3 of the Jurisdictional Statement and Appendix C thereto. Other statutes involved besides Article 12, Section 22, of the California Constitution, Section 2113, California Public Utilities Code and Section 1218 California Code of Civil Procedure, cited by appellant, are: Sections 1209, 1211,

1212, 1217, 1222 of the California Code of Civil Procedure; Section 166(4) California Penal Code; Sections 312, 2100, 2105, 2106, 2110 California Public Utilities Code, attached hereto as Appendix A.

QUESTIONS PRESENTED

The questions presented by appellant are not completely and accurately stated. Based upon the record, and decisions of the Commission and the California Supreme Court, the questions before this Court may be stated as follows:

1. Can a State agency with plenary powers derived directly from the Constitution of the State of California, including the power to punish for contempt, exercise its constitutional contempt power (implemented by its statutory contempt power) to adjudge a party guilty of *civil contempt,* and impose *civil sanctions* pursuant to such judgment, after a hearing has been afforded such party, without violating the due process of law requirements of the Fourteenth Amendment to the Federal Constitution?

2. Is a trial by jury necessary, in order to comply with the due process requirements of the Fourteenth Amendment to the Constitution of the United States, in a state administrative agency proceeding in which a party has been adjudged in civil contempt for failure to obey an order of the agency?

STATEMENT OF THE CASE

Appellant, a common carrier by railroad, operates a commuter passenger service between San Francisco and San Jose, California. It sought to charge parking fees for automobiles using its parking lots adjacent to the stations along the route between those two points. The Commission issued a temporary restraining order on October 10, 1967, directing petitioner to refrain from collecting the parking

charges pending further order of the Commission. Appellant sought a writ of prohibition from the California Supreme Court to enjoin the Commission from enforcing the restraining order, but the writ was denied November 8, 1967. Appellant also sought a writ of review of the Commission's order from the California Supreme Court which was denied December 20, 1967.

In a third proceeding before the California Supreme Court appellant filed a petition for a writ of prohibition to enjoin the Commission from entertaining a contempt proceeding based on appellant's alleged noncompliance with the October 10th order. Simultaneously appellant sought judicial stay of the order. This petition for the writ and stay was denied November 29, 1967.

The Commission, in the meantime, had issued its order in Decision No. 73352, dated November 14, 1967, which directed appellant to show cause why it should not be held in contempt for refusal to comply with the Commission's order, which appellant admits (Juris. Stat. p. 4) was demonstrated by its actions during the period of November 2 through November 8, 1967. The contempt hearing was held before a Commissioner and Examiner on November 30 and December 21, 1967 in the usual manner, pursuant to authority conferred by the California Constitution in Article 12, Section 22 and the California Public Utilities Code Section 2113. On April 16, 1968, the Commission issued its decision (Decision No. 74006, Appendix A, Juris. Stat.) finding appellant in contempt of the Commission and ordering it to pay a fine of $22,000. Appellant filed a petition for rehearing on April 26, 1968, which was denied by the Commission by Decision No. 74174, dated May 28, 1968.

Pursuant to Sections 1756-1770, California Public Utilities Code, appellant petitioned the California Supreme

Court for a writ of review, contending *inter alia* that: (1) the delegation of *criminal contempt* powers to state administrative agencies was a *per se* violation of appellant's right to due process of law under the Fourteenth Amendment of the United States Constitution and (2) that the finding of appellant in contempt of the Commission, without affording appellant a trial by jury, was in contravention of the Fourteenth Amendment of the Constitution of the United States.

On September 25, 1968, the California Supreme Court issued its order affirming the Commission's decision holding appellant in contempt by denying appellant's petition for writ of review. Appellant then filed an action in the Federal District Court of the Northern District of California, No. 50166, to enjoin the Commission from enforcing its order of April 16, 1968. This suit was dismissed on November 10, 1968. Thereafter, appellant filed its Jurisdictional Statement for this Court's consideration.

ARGUMENT

The questions presented are so unsubstantial as not to warrant further argument. Appellant bases its argument on assumptions for which it has presented no evidence nor cited any authority. In the first question presented "whether the power to punish for criminal contempt may be conferred on a state administrative agency" (Juris. Stat. p. 5), appellant admits that this issue is novel and that it has no specific authority for its contention in this regard. As to the second question, appellant assumes, without presenting any basis for the assumption, that the contempt proceedings here involved were proceedings in *criminal* contempt. If, as the California Supreme Court has held below by denial of review, these proceedings were in *civil* contempt,

the opinion of this Court in *Bloom v. Illinois,* 391 U.S. 194 (1968), would not be applicable since it involved criminal contempt only and, therefore, would not be a basis for the jurisdiction of this Court. In other words, the decision of the California Supreme Court in these proceedings was predicated on a nonconstitutional issue, i.e., whether the Commission correctly exercised its power to find appellant in *civil* contempt. Therefore, this appeal should be dismissed for want of a substantial federal question.

Moreover, even if appellant had been adjudged guilty of criminal contempt, this Court has held that the principles referred to in *Bloom* would not be applied retroactively. in *De Stefano v. Woods,* 392 U.S. 631, 634-635, 20 L.ed.2d 1308, 1312 (June 17, 1968) this Court said:

> "However, the tradition of nonjury trials for contempts was more firmly established than the view that States could dispense with jury trial in normal criminal prosecutions, and reliance on the cases overturned by Bloom v. Illinois was therefore more justified. Also, the adverse effects on the administration of justice of invalidating all serious contempt convictions would likely be substantial. Thus, with regard to the Bloom decision, we also feel that retroactive application is not warranted.
>
> "For these reasons we will not reverse state convictions for failure to grant jury trial where trials began prior to May 20, 1968, the date of this Court's decisions in Duncan v. Louisiana and Bloom v. Illinois. . . ."

This quotation from the *De Stefano* case makes it clear that the *Bloom* decision will not be made applicable to trials begun prior to May 20, 1968. The hearings in the proceedings, here under review, began on November 30, 1967. Thus, even on the assumption that all other arguments could be

resolved in favor of appellant, the doctrine of the *Bloom* case is unavailable to appellant in these proceedings.

Appellant refers to "the spirit of decisions of this Court, including two handed down only last year," (Juris. Stat. p. 5) as the reason for its contention that the California Supreme Court erred in its decision in regard to the delegation of contempt powers to state administrative agencies. It is nowhere stated what that "spirit" is, or precisely in which decisions it is to be found, but this does not deter appellant from reaching back seventy-five years for an obscure and obsolete dictum in the vain hope of bolstering its tenuous argument.

This dictum is to be found in an opinion of this Court in *Interstate Commerce Commission v. Brimson,* 154 U.S. 447, 485 (1894), which states that a *federal* administrative agency could not ". . . consistently with due process of law, be invested with authority to compel obedience to its orders" by the use of contempt powers. This Court, however, upheld the I.C.C.'s right to petition to enforce its own subpoena in a court, and to compel Brimson to testify, in order that the agency might be aided to carry out the duties imposed on it by Congress.

Though jurisdiction in federal contempt matters arising from federal administrative orders has now been lodged with the federal courts by statute, this procedure has merely resulted in these courts determining whether or not the administrative agency has performed its functions properly. If so, the federal courts must enforce the agency's orders. (*National Labor Relations Board v. Warren Co.,* 350 U.S. 107, 112-113 (1955).) Thus, this Court has recognized the *de facto* contempt power within federal agencies, though the *form* of enforcement (obtaining a court order) makes enforcement appear to be outside of the agency's power.

In any event, appellant admits that the *Brimson* dictum has been applied only to federal agencies. No decision has been cited by appellant or discovered by the appellee which makes this dictum applicable specifically to the states under the Fourteenth Amendment of the United States Constitution. However, this Court has approved the grant of judicial powers to state administrative agencies for many years. (*Consolidated Rendering Co. v. Vermont,* 207 U.S. 541, 552 (1908); *Carfer v. Caldwell,* 200 U.S. 293 (1906).)

The Commission is an independent agency, deriving its powers and authority from the Constitution and the Legislature of the State of California, including its judicial powers of contempt. (Art. XII, Sec. 22, California Constitution; §§ 312, 2105, 2106, 2113 Public Utilities Code; also *Van Hoosear v. Railroad Comm.,* 189 Cal. 228, 231 (1922); *In re Victor,* 220 Cal. 729 (1934).) Thus, it is evident that the Commission has been delegated judicial powers and the authority to use them. Absent a clear violation of due process of law, and subject to other constitutional limitation, these powers, including the contempt power, may be exercised by the Commission.

Appellant has not made a persuasive argument in support of its assertion that there has been a misdelegation of contempt powers to the Commission. The only basis for the assertion is that appellant's erroneous interpretation of the opinion in the *Brimson* case should somehow become the standard for state administrative agencies, with respect to due process requirements, as applied to the states. In an attempt to buttress this specious argument, appellant recites a number of opinions which are at variance with the facts. There has been no authority cited for appellant's irrelevant assertion:

> "that state administrative agencies are customarily more political in nature and less quasi-judicial in their

approach than federal administrative tribunals, being more often made up of shorter term, non-lawyer, elective, rather than appointive officials, who generally receive lower salaries." (Juris. Stat. p. 7.)

It is not the purpose here to discuss state agencies in general since such discussion would be wholly immaterial and irrelevant. This assertion is a *non sequitur* on its face.

In any event, to set the record straight, the Commissioners are appointed for six year terms that are staggered to provide for continuity of policy, as is the case with United States Senators. Many have been lawyers throughout the history of the Commission, for whatever significance that may have. And, as appellant admits, (Juris. Stat. footnote 1, p. 7), the presiding Commissioner in the proceeding below was a lawyer.

The Government Code of California requires that salaries paid to state officials be comparable to those paid for similar work performed outside of state service (Section 18852 Government Code), but the size of the salary paid is no guarantee of the quality of the service, a fact so well known as to be susceptible of judicial notice. Thus, it is evident that appellant, lacking sufficient basis and authority to support its argument, has presumed upon the patience of this Court with a lot of nonsense which is unworthy of the Court's attention.

In regard to the second question, whether a jury trial is necessary in contempt proceedings before a state administrative agency, it has been stated above that no specific authority has been presented in support of this contention. The *Bloom* and *Brimson* cases, upon which appellant places such great reliance, do not discuss the right to a jury trial as being applicable to an administrative agency's proceedings. In *Bloom* this Court cited the *Brimson* case, and many

others, only for the proposition that this Court had consistently affirmed the power of state and federal *courts* to punish for *criminal* contempt without a jury trial.

The question whether the admitted failure of appellant to comply with the Commission's order was a criminal or civil contempt was squarely before the California Supreme Court. Its attention was directed to the principal criteria used to make such a classification that were set forth by this Court in *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911). This Court there held that the fact of punishment alone is not determinative, but rather the character and purpose of the punishment are the decisive factors for classification purposes. If the purpose is *remedial*, the proceeding is one for civil contempt, while if the purpose is *punitive* the contempt is criminal. If the disobedience of the defendant consisted of refusing to do an act that was required by "an order which either in form or substance was mandatory in its character," rather than the doing of an act that was prohibited, the former refusal constituted civil contempt, while the latter (commission of a prohibited act) was a criminal contempt.

The amount of the fine or length of imprisonment are not determinative on this issue. Substantial fines and imprisonment have been imposed by courts, and by administrative agencies, in civil contempt proceedings (*United States v. United Mine Workers*, 330 U.S. 258 (1946); *McCrone v. United States*, 307 U.S. 61 (1939); *Brotherhood of Loc. Fire & Eng. v. Bangor & Aroostook R. Co.*, 380 F.2d 570 (1967); *Parker v. United States*, 153 F.2d 66 (1946).)

The California Supreme Court also was referred to its prior decision in which the distinction between civil and criminal contempt was considered in some detail. In the case of *In re Morris*, 194 Cal. 63, 69 (1924) that Court said:

> "It was the plain intent of the Legislature, expressed in the cited code sections [Section 1209, *et seq.*, Code Civ. Proc., and Sec. 166(4) Pen. Code] to give a double aspect to the wrongful acts there enumerated. In one aspect they are to be regarded as offenses against the dignity and authority of the Court, remediable in accordance with the rules prescribed in the Code of Civil Procedure. In the other aspect they are to be regarded as offenses against the peace and dignity of the People of the State of California and remediable as such in accordance with the rules prescribed in the Penal Code. . . ."

If the proceeding is brought pursuant to Section 1209, *et seq.* (including Section 1218 cited by appellant) of the California Code of Civil Procedure, it is *civil* in character. Conversely, criminal contempt proceedings are brought under Section 166 of the Penal Code and are governed by its procedures exclusively (*In re Bruns,* 15 Cal.App.2d 1, 5 (1936); *In re Morris, supra*).

Appellant does not dispute the fact that Section 1218 of the California Code of Civil Procedure was used to determine the fine imposed by the Commission. The purpose of the fine was coercive, compensatory and remedial, since the Commission wished to remedy the situation, arising out of appellant's failure to comply with its order, by imposing certain mandatory duties on appellant, which, if not performed, would subject it to a fine. Among the duties required of appellant were: (a) to file a plan with the Commission stating how the parking fees collected would be refunded, and (b) to post a "Notice of Refund" so claimants could have an opportunity to reclaim their money. The refunds paid were to be "credited against the fine." (See Decision No. 74006, Appendix A, Juris. Stat. p. 7.)

Had the Commission intended to proceed against appellant in a criminal action, it would have done so under Section 2104 of the Public Utilities Code in superior court for a violation of the Commission order. Such violation is a misdemeanor under Section 2110 of the Public Utilities Code, which sets forth definite and fixed punishment of a $1,000.00 fine or a year's imprisonment, or both.

Therefore, when all the factors discussed above are considered, it is clear that appellant was properly found by the California Supreme Court to be in civil contempt of the Commission. Since the right to a jury trial in contempt proceedings is limited to cases involving criminal contempt, this Court's opinions in *Duncan v. Louisiana,* 391 U.S. 145 (1968) and *Bloom v. Illinois,* 391 U.S. 194 (1968) have no application to these proceedings in civil contempt.

This determination was made by the California Supreme Court. No substantial federal question is involved. Thus, there has been no violation of appellant's constitutional right to a trial by jury pursuant to the Fourteenth Amendment to the Constitution of the United States, and therefore, there is no jurisdiction to take this appeal.

CONCLUSION

The delegation of contempt powers to the Commission is guaranteed by the Constitution of the State of California. It has been supplemented by the California Legislature by provisions enacted as part of the California Public Utilities Code. These contempt powers were properly exercised at all times in these proceedings. The lack of a jury trial in this civil contempt proceeding was not a violation of due process of law under the Fourteenth Amendment to the Constitution. Moreover, the California

Supreme Court has decided the case on other than constitutional grounds. Therefore, since there is want of a substantial federal constitutional question, the decision of the California Supreme Court should be affirmed, or this appeal dismissed.

Respectfully submitted,

MARY MORAN PAJALICH
RODERICK B. CASSIDY
TIMOTHY E. TREACY
JAMES A. BLUMBERG
Attorneys for Appellee
The Public Utilities
Commission of the
State of California

(Appendix A Follows)

Appendix A

California Code of Civil Procedure

§ 1209. Acts or omissions constituting

The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;

2. A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding;

3. Misbehavior in office, or other wilful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person, appointed or elected to perform a judicial or ministerial service;

4. Abuse of the process or proceedings of the court, or falsely pretending to act under authority of an order or process of the court;

5. Disobedience of any lawful judgment, order, or process of the court;

6. Rescuing any person or property in the custody of an officer by virtue of an order or process of such court;

7. Unlawfully detaining a witness, or party to an action while going to, remaining at, or returning from the court where the action is on the calendar for trial;

8. Any other unlawful interference with the process or proceedings of a court;

9. Disobedience of a subpena duly served, or refusing to be sworn or answer as a witness;

10. When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with

a party to an action, to be tried at such court, or with any other person, in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court;

11. Disobedience by an inferior tribunal, magistrate, or officer, of the lawful judgment, order, or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate, or officer.

No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings.

§ 1211. Summary punishment; order; affidavit or statement of facts

When a contempt is committed in the immediate view and presence of the court, or of the judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed.

When the contempt is not committed in the immediate view and presence of the court, or of the judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officers.

§ 1212. Warrant of attachment; issuance; order to show cause; warrant of commitment

When the contempt is not committed in the immediate view and presence of the court or judge, a warrant of attachment may be issued to bring the person charged to answer, or, without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment can be issued without such previous attachment to answer, or such notice or order to show cause.

§ 1217. Trial

When the person arrested has been brought up or appeared, the court or judge must proceed to investigate the charge, and must hear any answer which the person arrested may make to the same, and may examine witnesses for or against him, for which an adjournment may be had from time to time if necessary.

§ 1222. Conclusiveness of judgments and orders

The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive.

California Penal Code

§ 166. Criminal contempts; conduct constituting

CRIMINAL CONTEMPTS. Every person guilty of any contempt of Court, of either of the following kinds, is guilty of a misdemeanor:

1. Disorderly, contemptuous, or insolent behavior committed during the sitting of any Court of justice, in immediate view and presence of the Court, and directly tending to interrupt its proceedings or to impair the respect due to its authority;

2. Behavior of the like character committed in the presence of any referee, while actually engaged in any trial or hearing, pursuant to the order of any Court, or in the presence of any jury while actually sitting for the trial of a cause, or upon any inquest or other proceedings authorized by law;

3. Any breach of the peace, noise, or other disturbance directly tending to interrupt the proceedings of any Court;

4. Willful disobedience of any process or order lawfully issued by any Court;

5. Resistance willfully offered by any person to the lawful order or process of any Court;

6. The contumacious and unlawful refusal of any person to be sworn as a witness; or, when so sworn, the like refusal to answer any material question;

7. The publication of a false or grossly inaccurate report of the proceedings of any Court;

8. Presenting to any Court having power to pass sentence upon any prisoner under conviction, or to any member of such Court, any affidavit or testimony or representation of any kind, verbal or written, in aggravation or mitigation of the punishment to be imposed upon such prisoner, except as provided in this Code.

California Public Utilities Code

312. The commission and each commissioner may issue writs of summons, subpenas, warrants of attachment, warrants of commitment, and all necessary process in proceedings for contempt, in like manner and to the same extent as courts of record. The process issued by the commission or any commissioner, extends to all parts of the State and may be served by any person authorized to serve process of courts of record, or by any person designated by the

commission or a commissioner. The person executing any such process shall receive such compensation as is allowed by the commission, not to exceed the fees prescribed by law on August 8, 1915, for similar services, and such fees shall be paid in the same manner as provided in this part for payment of the fees of witnesses.

Chapter 11. Violations

2100. Whenever the commission, after a hearing, finds that any common carrier, other than a railroad corporation, has charged, collected, or received, a lesser compensation for the transportation of persons or property, or for any service in connection therewith, than the applicable rates, fares, and charges, specified in its tariff schedules filed and in effect at the time, or that such carrier has refunded or remitted in any manner or by any device any portion of the rates, fares, or charges so specified without an order of the commission so authorizing, the commission shall require the carrier to collect the undercharges involved and may impose upon the carrier a fine equal to the amount of such undercharges. All such fines shall be paid into the State Treasury to the credit of the General Fund. The remedy and penalty provided by this section shall be cumulative and shall not be a bar to or affect any other remedy or penalty provided for in this part, or to the exercise by the commission of its power to punish for contempt.

2105. All penalties accruing under this part shall be cumulative, and a suit for the recovery of one penalty shall not be a bar to or affect the recovery of any other penalty or forfeiture or be a bar to any criminal prosecution against any public utility, or any officer, director, agent, or employee thereof, or any other corporation or person, or to the exercise by the commission of its power to punish for contempt.

2106. Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was wilful, it may, in addition to the actual damages, award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person.

No recovery as provided in this section shall in any manner affect a recovery by the State of the penalties provided in this part or the exercise by the commission of its power to punish for contempt.

2110. Every public utility and every officer, agent, or employee of any public utility, who violates or fails to comply with, or who procures, aids, or abets any violation by any public utility of any provision of the Constitution of this state or of this part, or who fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or abets any public utility in such violation or noncompliance in a case in which a penalty has not otherwise been provided is guilty of a misdemeanor and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 26 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1050

SOUTHERN PACIFIC COMPANY,
a corporation,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California

Appellant's Brief In Opposition To Motion To Dismiss Or Affirm

ROBERT L. PIERCE
JOHN MACDONALD SMITH
ROBERT S. BOGASON
65 Market Street
San Francisco, Calif. 94105

Counsel for Appellant Southern Pacific Company

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

TABLE OF CONTENTS

	Page
Preliminary Statement	1
Argument	2
I. Appellant's Contention that the Granting to the California Public Utilities Commission of Power to Punish for Contempt Violates the Due Process Clause of the Fourteenth Amendment to the Federal Constitution Raises a Novel and Substantial Federal Question	2
II. Appellant's Contention that the Legislative Failure to Provide Jury Trial in a Serious Criminal Contempt Proceeding Further Violated the Due Process Requirements of the Fourteenth Amendment Also Raises a Novel and Substantial Issue	7
Conclusion	13

TABLE OF AUTHORITIES CITED

Cases	Pages
Bloom v. Illinois, 391 U. S. 194	3, 6, 7, 8, 12
Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R., 380 F.2d 570	8
Butler v. Superior Court, 178 Cal. App. 2d 763	11
Carfer v. Caldwell, 200 U. S. 293	5
City of Culver City v. Superior Court, 38 Cal. 2d 535	11
Consolidated Rendering Co. v. Vermont, 207 U. S. 541	5
De Stefano v. Woods, 392 U. S. 631	12
Foust v. Foust, 47 Cal. 2d 121	11
Gompers v. Bucks Stove & Range Co., 221 U. S. 418	4, 8
Hibben v. Smith, 191 U. S. 310	3
Hotaling v. Superior Court, 191 Cal. 501	11
In re Bruns, 15 Cal. App. 2d 1	11
In re Gould, 195 Cal. App. 2d 172	11
In re Mancini, 215 Cal. App. 2d 57	11
In re Morris, 194 Cal. 63	11
In re Oliver, 333 U. S. 257	6, 7
In re Wren, 48 Cal. 2d 159	11
Interstate Commerce Commission v. Brimson, 154 U. S. 447	2, 3, 4, 5, 6
Kern-Limerick, Inc. v. Scurlock, 347 U. S. 110	10
McCrone v. United States, 307 U. S. 61	8
Napue v. Illinois, 360 U. S. 264	10
National Labor Relations Board v. Warren Co., 350 U. S. 107	5
Parker v. United States, 153 F.2d 66	8, 9, 10
Phillips v. Superior Court, 22 Cal. 2d 256	11
Reitman v. Mulkey, 387 U. S. 369	7

Pages

Southern Pacific Company v. Public Utilities Commission of the State of California, on Appeal from the United States District Court for the Northern District of California (No. 1152, Oct. Term, 1968) 2

United Public Workers v. Mitchell, 330 U. S. 75 1
United States v. United Mine Workers, 330 U. S. 258 ..... 1, 8

UNITED STATES CONSTITUTIONAL PROVISIONS

Fifth Amendment 2, 3
Fourteenth Amendment 3, 5, 6, 7

STATUTES

California Code of Civil Procedure
§ 1218 12

OTHER

U. S. Supreme Court Rules
Rule 13 ..... 1, 2
Rule 33(3)(b) 14
Rule 34 2

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1050

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California

Appellant's Brief In Opposition To Motion To Dismiss Or Affirm

PRELIMINARY STATEMENT

Appellee's contention, (page 2 of motion) that this appeal should be dismissed because appellant did not docket the case within 90 days after the judgment appealed from, as prescribed by Rule 13 of the revised rules of this Court, is without merit. Under this Court's rules timely docketing is not jurisdictional. *United Public Workers v. Mitchell,* 330 U.S. 75, 84-86[1] (1945). This appeal was docketed on

1. The Court said, 330 U.S. at 86: "It will not expedite determination of constitutional questions to dismiss appeals because of errors of practice."

February 17, 1969, 55 days after the December 24, 1968 limit set forth in the rules, as revised effective October 2, 1967. The filing was thus within the 60 day extension period subsequent to December 24, 1968, which a justice of this Court might have granted for good cause shown under revised Rules 13 and 34, provided appellant had made application prior to December 24, 1968. Furthermore, the case was timely docketed under Rule 13, as it existed prior to the 1967 revision, since it was docketed within 60 days of the filing of the notice of appeal on December 20, 1968. Appellee in no wise alleges any prejudice or hardship which has resulted to it, because of this inadvertent delay. Finally, in any event, the matter has been rendered moot by the timely docketing on March 13, 1969 of appellant's companion appeal from the federal district court for the northern district of California in No. 1152, *Southern Pacific Company v. Public Utilities Commission of the State of California, et al.*, which raises the identical two constitutional issues raised in the present appeal, along with others.

ARGUMENT

I. Appellant's Contention That the Granting to the California Public Utilities Commission of Power to Punish for Contempt Violates the Due Process Clause of the Fourteenth Amendment to the Federal Constitution Raises a Novel and Substantial Federal Question.

Appellee's motion to dismiss does not dispute the novelty of this question, and, we submit, it does not establish that it is without substance.

Our contention that this issue does present a substantial federal question is two-fold in nature. First, we contend that since this Court in *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 485 (1894), has recognized that the due process requirements of the Fifth Amendment are

violated when a federal administrative agency is delegated power to punish for contempt, and since it is settled that, in general, the Fourteenth Amendment carries the same limitations on arbitrary state actions which the Fifth Amendment imposes with respect to federal action (*Hibben v. Smith,* 191 U.S. 310, 325 (1903)), therefore, the Fourteenth Amendment precludes a state from delegating to one of its administrative bodies the power to punish for contempt. Secondly, we assert that since this Court's decision last year in *Bloom v. Illinois,* 391 U.S. 194, 20 L.Ed. 2d 522 (1968) holds that in serious state criminal contempt cases the due process clause of the Fourteenth Amendment requires that all established fundamental protections of our judicial system, and particularly the right of trial by jury, must be accorded, and since the right of trial before a court, even in petty criminal cases, is even more fundamental than the right of trial by jury, therefore, granting of power to an administrative body rather than a court to try such a case is a violation of the due process clause of the Fourteenth Amendment for this further reason.

For purposes of our first contention, appellee's major argument throughout its motion that the instant administrative proceedings involved civil rather than criminal contempt, which we shall point out is completely erroneous, is, in any event, entirely immaterial. This is because the language in *Brimson,* on which we rely as establishing that due process prohibits granting to a federal administrative body the power to punish for contempt, clearly indicates that the Court was referring to civil contempt proceedings. The pertinent quotation from *Brimson* (154 U.S. at 485), is as follows:

> "Such a body [a federal administrative agency] could not, under our system of government, and con-

> sistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment."

Since the Court spoke of contempt "to compel obedience to its orders" it definitely had in mind contempt for remedial, instead of penal, purposes. It is apparent too from the decision in that case that the Court was concerned with remedial, rather than punitive, proceedings. Thus, the decision actually held that a federal court could constitutionally be directed by the Interstate Commerce Act to entertain a petition of the Interstate Commerce Commission, to compel a recalcitrant witness before the Commission to produce documents relating to a matter under investigation by the Commission, even though, as indicated in the quoted excerpt, contempt powers could not constitutionally have been conferred upon the Commission. In view of this, by appellee's own description of the major distinction between civil and criminal contempt proceedings, it is evident that the Court in *Brimson* was really stating that civil contempt powers could not constitutionally be granted to a federal administrative commission. Thus, appellee in its motion (p. 10), in correctly paraphrasing the established distinction between the two types of contempt proceedings recognized in *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911), states:

> "If the purpose is *remedial*, the proceeding is one for civil contempt, while if the purpose is *punitive* the contempt is criminal."

We submit that *Brimson* must be accepted as even stronger authority for the proposition that power to punish for criminal contempt cannot constitutionally be vested in a federal administrative body.

Appellee's statement (pg. 1) that at the federal level administrative bodies may properly be given *de facto* contempt powers does not mean that they have the power to punish for contempt, as appellee recognizes, when it adds (pg. 7) ". . . though the form of enforcement (obtaining a court order) makes enforcement appear to be outside of the agency's power." The established statutory pattern in the federal field, is to follow the division of power approved in *Brimson*, as described in *National Labor Relations Board v. Warren Co.*, 350 U.S. 107, 112-113, cited by appellee (pg. 7) of granting the administrative body power to issue a substantive order in its field and granting the federal courts power to enforce it by the judicial remedy of contempt. Here, we are concerned only with the power of enforcement by contempt proceedings of orders of state administrative bodies. California chose to confer this power upon the same administrative agency which made the involved order, the Public Utilities Commission of California, rather than upon its courts. We submit that due process requires *a fortiori* that the states must be confined to the same pattern as the federal government, and that accordingly California's departure from that pattern is unconstitutional.

The only two cases cited by appellee (pg. 8) in opposition to our contention that delegation of contempt powers to the Commission was unconstitutional are not pertinent, because they do not deal with the validity under the Fourteenth Amendment of conferring contempt powers upon a state administrative agency. *Consolidated Rendering Company v. Vermont*, 207 U.S. 541 (1908) merely sustained the validity of a contempt fine imposed by a state court for failure to provide certain papers to a grand jury. *Carfer v. Caldwell*, 200 U.S. 293 (1906) merely upheld a state law conferring power upon a committee of the state legislature to compel attendance of a witness before it.

Appellee cites these cases for the proposition that the due process clause of the Fourteenth Amendment does not compel states to observe the doctrine of separation of powers applicable to the federal government and accordingly does not prevent a state from conferring upon non-judicial agencies certain functions that may be called judicial. We think it is clear, however, that while this Court in the quoted excerpt from *Brimson* had in mind to some extent the doctrine of separation of powers as a reason for denying the validity of granting contempt powers to a federal administrative body, it also definitely indicated that such delegation was further proscribed by other and independent aspects of due process of law. Thus, this Court in that excerpt stated that such delegation could not validly be done "under our system of government," which apparently referred to the doctrine of separation of powers, but also "consistently with due process of law." In any event, *Bloom v. Illinois* now establishes that serious criminal contempt proceedings must be accorded all the protections embraced within the concept of "due process of law", including jury trial, as part of "all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice." (20 L.Ed. 2d at 533) Certainly the right to trial before a court rather than a commission in such a case is even more fundamental than the right to trial by jury. This was implicitly recognized in *Bloom*, since the Court stated (20 L.Ed 2d at 531), citing *In Re Oliver*, 333 U.S. 257 (1948):

> "It has also been recognized that the defendant in criminal contempt proceedings is entitled to a public trial before an unbiased judge."[2]

---

2. The bias which appellant contends was exhibited in this contempt proceeding and not subjected to appropriate independent judicial review is raised in our companion appeal in No. 1152.

In the cited *Oliver* case this Court declared, 333 U.S. at 278:

> "It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal."

Appellee's emphasis (pg. 8) of the fact that the Commission derives its contempt powers not only from the statutes of California but also from the constitution of this state is completely without avail, since the issue here is not one of separation of powers but instead of due process. It is settled that the federal constitutional due process clause is paramount even to California constitutional provisions, *Reitman v. Mulkey*, 387 U.S. 369 (1967). Appellee, in fact, admits this when it states (pg. 8):

> "Absent a clear violation of due process of law . . . these powers, including the contempt power, may be exercised by the Commission."

II. Appellant's Contention That the Legislative Failure to Provide Jury Trial in a Serious Criminal Contempt Proceeding Further Violated the Due Process Requirements of the Fourteenth Amendment Also Raises a Novel and Substantial Issue.

In this connection we assert that since *Bloom v. Illinois* holds that due process under the Fourteenth Amendment requires a jury trial in non-petty criminal contempt proceedings before a state court, *a fortiori*, it requires that a state provide for the right to jury trial where it permits one of its administrative bodies to act as judge in such type matters. Appellee observes (pg. 9) that, the *Bloom* case, on which we here rely, does not discuss the right to a jury trial as being applicable to an administrative agency. That, of course, is obvious, since such a matter was not before the Court in that case. However, such situation, coupled with the fact that appellee cites not a single case

as having heretofore dealt with this specific basic question, merely illustrates the novelty of the issue.

In order for this issue also to be substantial we, admittedly, must establish reasonable grounds for the conclusion that the present proceedings involved both criminal, rather than civil, contempt and also a non-petty matter within the scope of *Bloom*. This we shall now proceed to do.

Appellee devotes its entire defense on this issue to arguing that the instant proceedings involved civil and not criminal contempt (pp. 10-12). It should be observed, at the outset, that the impression which appellee attempts to convey (pp. 5-6, 12-13), that the California Supreme Court, in denying a writ of review in this case, actually held that this was a civil contempt matter and thus adjudged the case on non-federal grounds, is patently untrue. From the laconic post card notice order which it issued, "Petition for writ of review denied"[3] no one can tell on what grounds it decided the case.

Appellee cites certain federal cases[4] for the general proposition that there is a distinction between criminal and civil contempt. Accepting that general proposition, however, a review of those cases indicates that under them appellant's contempt conviction can only be described as criminal, and not civil, in nature.

These cases do recognize the distinction but also describe the standards for determination whether a contempt is

---

3. The failure of the California Supreme Court to provide independent judicial review of the Commission's record on important issues of procedural due process is attacked in our companion appeal in No. 1152.

4. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, (1911); *United States v. United Mine Workers*, 330 U.S. 258 (1947); *McCrone v. United States*, 307 U.S. 61 (1939); *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R.* (C.A. D.C., 1967), 380 F.2d 570; *Parker v. United States*, (C.A. 1, 1946), 153 F.2d 66

criminal or civil in nature. Those standards or distinctions are as follows:

1. A civil contempt action is brought by the party economically injured by the contumacious act while a criminal contempt action is brought on behalf of the tribunal or governmental entity whose order was disobeyed.

2. A civil contempt action is part of the original action between the private parties while a criminal contempt proceeding is a separate and distinct action.

3. The purpose of a civil contempt proceeding is purely remedial and is to make reparation to a complainant injured by the contumacious act. Additionally, its purpose is to coerce obedience to a decree issued in complainant's favor or to compensate complainant for a loss caused by the act. As a result, the fine is payable to the complainant rather than to the tribunal. Such fine cannot exceed the actual loss incurred by the complainant if it is to be considered a civil proceeding. On the other hand, a criminal contempt conviction is "after the fact" punishment to vindicate the authority of the tribunal and deter future offenses. The fine is generally payable to the tribunal not the injured party. However, such a fine does not lose its punitive character even though a portion is directed to be paid to a private party injured by the contumacious act. *Parker v. United States*, (C.A. 1, 1946) 153 F.2d 66, 70.

4. The mere fact that the punishment is by fine with no imprisonment does not prevent a contempt conviction from being punitive and criminal in nature.

5. In civil contempt, the punishment is for refusing to do an act commanded which is remedied by punishment until the party performs the required act. Criminal contempt is for a past act and the punishment cannot be avoided by subsequent obedience to the tribunal.

Judged by such federal standards, the conviction of appellant for contempt of the Commission was clearly punitive in nature and not coercive or remedial. (1) The contempt action was instituted by the Commission on an affidavit of a Commission employee and not by an individual parking patron. (2) The contempt proceeding was separate and apart from the substantive case involving appellant's parking lot charges, even though given the same case number. (3) The contempt action, instituted on November 15, 1967, was for certain specifically described past violations of Commission orders. Thus it was to punish for past violations and was not remedial or coercive in order to terminate present violations. (4) The fine of $22,000 was absolute by its own terms and obligated appellant to the extent of $22,000. There was no evidence in the proceeding as to the actual losses suffered by individual parking patrons and the fine was not based upon any evidence of these charges collected by appellant. The mere fact that appellant was to be given credit towards the fine for any refunds made does not cause the fine to be considered remedial or coercive. (*Parker v. United States, supra*, pg. 70). (5) Appellant could not avoid the fine by cessation of charges because the fine was levied for past rather than present violations of the Commission's order. It is obvious that the imposition of the $22,000 fine could not remedy the alleged historical fact that appellant had not fully complied with the Commission order.

Any determination by the California courts as to the nature of these contempt proceedings is, of course, not binding upon this Court. Thus, in *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121 (1954) and *Napue v. Illinois*, 360 U.S. 264, 272 (1959), this Court referred to

> ". . . the long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest."

Nevertheless, the California courts[5] have recognized the same common law distinctions between criminal and civil contempt, the former being "directed primarily to the maintenance of the dignity and authority of the court," and the latter having the "primary object [of] the protection of the private rights of the parties litigant." *In Re Morris*, 194 Cal. 63, 66 (1924). Appellee's statement (p. 11) that the *Morris* case and *In Re Bruns*, 15 Cal. App.2d 1 (1936) held that merely because a contempt proceeding was brought under the Code of Civil Procedure, as this was, is patently erroneous. In the former case, the California Supreme Court said (194 Cal. 63 at 67):

> "Both of these classes of contempts are contemplated by and provided for in the provisions of our Code of Civil Procedure, above cited, and are to be investigated and punished in the same manner and in accordance with the same rules."

While appellee in its motion does not contend to the contrary, it is plain that this proceeding involved a serious and non-petty offense. Here, we submit the fine imposed, $22,000, was sufficiently substantial to bring the case out

---

5. It is difficult to find in California law a more settled proposition than that contempt proceedings are criminal in nature, whether or not they are brought pursuant to applicable provisions of the California Code of Civil Procedure. *Foust v. Foust*, 47 Cal. 2d 121, 302 P.2d 11 (1956); *City of Culver City v. Superior Court*, 38 Cal. 2d 535, 241 P.2d 258 (1952); *Phillips v. Superior Court*, 22 Cal. 2d 256, 137 P.2d 838 (1943); *Hotaling v. Superior Court*, 191 Cal. 501, 217 Pac. 73 (1923); *In re Wren*, 48 Cal. 2d 159, 308 P.2d 329 (1957); *In re Mancini*, 215 Cal. App. 2d 57 (1963); *In re Gould*, 195 Cal. App. 2d 172 (1961); *Butler v. Superior Court*, 178 Cal. App. 2d 763 (1960).

of the petty offense category. Although the $500 fine permitted by § 1218, California Code of Civil Procedure, for a contempt is perhaps not substantial on its face, the California Supreme Court approved the arbitrary construction placed by the Commission on that section as permitting it to consider that it was not faced with what was in reality at most but a single act of contempt, refusal to obey the Commission's order, but rather with 44 separate acts of contempt, selected chargings of the involved parking fee to various motorists. In this fashion, by multiplying $500 by 44, the Commission, arrived at the very substantial $22,000 fine. On the same theory, since the same parking fee was assessed by appellant against hundreds of other motorists during this period, the Commission could have with impunity just as well have assessed a tremendous fine and imprisoned officers of appellant for five days for each individual car as to which a parking fee was collected.

There remains only appellee's contention, page 6, that the jury trial requirements of the *Bloom* case cannot, in any event, be made applicable here because in *De Stefano v. Woods*, 392 U.S. 631 (1968) the Court indicated that such requirement would not be enforced as to trials begun prior to May 20, 1968, and in this case the proceeding began before that date. It is apparent, however, that the reasons given in the *De Stefano* case for only prospective application of this doctrine are not applicable here. Such action was taken because it was recognized there that the *Bloom* case was overruling a long-established line of precedents and because of the possible adverse effects on the administration of justice. Here, in contrast the matter is one of first impression and following of the *De Stefano* rule will not jeopardize the administration of justice.

CONCLUSION

Since both of the issues raised by this appeal are clearly novel and substantial the Court should note jurisdiction and set the case for formal argument.

Respectfully submitted,

ROBERT L. PIERCE
JOHN MACDONALD SMITH
ROBERT S. BOGASON

By ROBERT L. PIERCE

Counsel for Appellant
Southern Pacific
Company

CERTIFICATE OF SERVICE

I, ROBERT L. PIERCE, one of the attorneys for SOUTHERN PACIFIC COMPANY, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify, pursuant to Rule 33(3)(b) of the Revised Rules of the Supreme Court of the United States, that on the 25th day of March, 1969, I served a copy of the foregoing Brief in Opposition to Motion to Dismiss or Affirm as follows:

On all counsel of record for the CALIFORNIA PUBLIC UTILITIES COMMISSION, by mailing a copy, in a duly addressed envelope, first class, postage prepaid, to said counsel at their post office address, 5072 State Building, San Francisco, California 94102.

Dated at San Francisco, California, this 25th day of March, 1969.

ROBERT L. PIERCE

Attorney for
Southern Pacific Company
65 Market Street
San Francisco, Calif. 94105

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 28 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1050

SOUTHERN PACIFIC COMPANY, *Appellant*,
v.
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Appellee*.

On Appeal From the Supreme Court of California

and No. 1152

SOUTHERN PACIFIC COMPANY, *Appellant*,
v.
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL., *Appellees*.

On Appeal From the United States District Court for the Northern District of California

PETITION FOR REHEARING

ROBERT L. PIERCE
JOHN MACDONALD SMITH
ROBERT S. BOGASON
Southern Pacific Company
65 Market Street
San Francisco, California 94105

STEPHEN AILES
JAMES H. PIPKIN, JR.
Steptoe & Johnson
1250 Connecticut Avenue, N. W.
Washington, D. C. 20036
Counsel for Appellant

May 28, 1969

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1050

SOUTHERN PACIFIC COMPANY, *Appellant,*

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Appellee.*

On Appeal From the Supreme Court of California

---

and No. 1152

SOUTHERN PACIFIC COMPANY, *Appellant,*

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL., *Appellees.*

On Appeal From the United States District Court for the Northern District of California

---

PETITION FOR REHEARING

Appellant prays that this Court grant rehearing of its order of May 5, 1969, in Docket No. 1050, granting appellee's motion to dismiss and dismissing the appeal and that the Court note probable jurisdiction of the appeal, as prayed for in the jurisdictional statement filed February 14, 1969, herein. Appellant also prays that this Court grant rehearing of its order of May 5, 1969, in Docket No. 1152, granting appellees' motion to affirm and affirming the judgment, and that the

Court note probable jurisdiction of the appeal, as prayed for in the jurisdictional statement filed March 12, 1969, herein. Because these cases arise out of the same proceeding and because they involve substantially the same issues, the cases will be discussed together.

REASONS FOR GRANTING REHEARING AND NOTING PROBABLE JURISDICTION

On May 19, 1969, two weeks after the decisions in the instant cases, the Supreme Court decided *Frank* v. *United States,* —— U.S. —— (37 Law Week 4437). Although the Court affirmed the criminal contempt conviction there involved, the Court's opinion clarified the guidelines for determining whether particular criminal contempts are "petty" offenses. These guidelines are relevant here.[1] In *Frank* the Court first explained that the defendant in a criminal contempt case, as in all other criminal cases, "is entitled to a jury trial unless the particular offense can be classified as 'petty'." The Court then stated that "in prosecutions for criminal contempt where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the offense." But "if the statute creating the offense specifies a maximum penalty, then of course that penalty is the relevant period." The Court went on to indicate that a sentence of imprisonment for more than six months would not be "petty." The Court quoted 18 U.S.C. § 1, which defines a petty offense as "any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months *or a fine of not more than $500,* or both . . . ." (Emphasis added.)

---

[1] *Frank* involved a contempt of a federal court, but the guidelines are applicable to state contempt proceedings under *Bloom* v. *Illinois*, 391 U.S. 194 (1968).

In the instant cases, appellee California Public Utilities Commission, under its authority to exercise a contempt power "in the manner and to the extent of the judicial power of contempt," is by state statute empowered to impose a penalty of $500 and/or 5 days' imprisonment for contempt. Here, however, the appellee completely avoided the statutory limits on its authority by proliferating the offenses. The alleged contempt consisted of violating one order which purported to require appellant to refrain from imposing fees for parking at its stations; but by adopting the device of counting each car for which a fee was charged as a separate contempt, appellee was able to magnify its power far beyond the petty offense category. It imposed a $22,000 fine, and if it had decided to proceed against appellant's officers individually, under the same reasoning it could have imprisoned them for 7½ months. Indeed by merely counting more cars, this power could have been expanded almost indefinitely—without any requirement of a trial by jury. This would seem to bring the case clearly within the rationale of *Bloom* and *Duncan* v. *Louisiana,* 391 U.S. 145 (1968).[2]

As Justices Black and Douglas stated in their dissent in *Frank* v. *United States:* "Those who commit offenses against courts should be no less entitled to the Bill of Rights than those who commit offenses against the public in general." *A fortiori,* those who commit offenses against administrative agencies should be no

---

[2] See *James* v. *Headley,* — F. 2d — (5th Cir. April 9, 1969), a case involving right to counsel in which the Fifth Circuit held that when a state charges a defendant with two or more crimes, for which the maximum sentence is over six months' imprisonment—although none of the charges alone subjects him to a penalty that great—Bill of Rights protections must be afforded. As Judge Wisdom there wrote for a unanimous panel: "If a guilty person is convicted, the sum of the potential penalties is what is important to him—and to society."

worse off, at least in situations where the agency possesses the kind of punitive powers which the California Public Utilities Commission has exercised here.

Absence of a jury trial was not the only procedural defect in these cases. Here the agency issued, ex parte, an order against the appellant without affording any notice or hearing or even an opportunity to see the information on which the order was based. Appellant believed in good faith that the order was void under state law and consequently complied only in part. Under state law, the agency then had the option of going to court to enforce its order (Public Utilities Code § 2101), but it chose instead to proceed by itself. A contempt proceeding was instituted, the result of which was prejudged by at least one agency member, as demonstrated by public accusations he made to newspaper reporters prior to the hearing. At the hearing, the same agency member participated as both prosecutor and presiding officer, and the validity of the order was considered not subject to challenge. This is the procedural foundation on which the $22,000 fine by the agency without a jury trial is based. It cries out for correction. Nonetheless, no court has yet heard the case on the merits,[3] despite the fact that the California Supreme Court's refusal to hear the case is considered a decision on the merits and hence a ratification of appellee's procedures. *People* v. *Western Air Lines,* 42 Cal. 2d 621; 268 P. 2d 723 (1954). Presumably appellee's powers can now be exercised in the same peremptory and indefinitely expandable fashion

[3] Appellee issues approximately 2000 decisions and orders per year. About 20 petitions for review are filed, "and the [California] Supreme Court has granted, on the average, less than two reviews of Commission decisions each year. This means that less than one out of a thousand Commission decisions has been heard by any court in recent years." Francis N. Marshall, Report to the Constitution Revision Committee of the California Legislature (1967).

demonstrated here not only against corporate utilities but also against private individual citizens as well.

In sharp contrast, *Frank* v. *United States* is a good illustration of what happens when a Federal administrative agency seeks to enforce an order. The agency must go to Federal court and seek an injunction. It puts on its case and the defendant has the opportunity to challenge the order, introduce evidence, and cross-examine the agency's witnesses. This way the agency must, in the context of a formal judicial proceeding with attendant procedural safeguards, persuade a judge that its order was proper and that an injunction should issue. Only after this is accomplished and the injunction is violated may the court (not the agency) find the defendant in contempt.

We should also point out again that the state statute in these cases giving the agency the power to punish for contempt is squarely in conflict with the holding of *ICC* v. *Brimson*, 154 U.S. 447, 485 (1894), that an administrative agency may not be invested with the contempt power "consistently with due process of law." The only differences between the cases are that (1) this is criminal contempt, which compels the *Brimson* rationale even more strongly than the civil contempt there involved, and (2) *Brimson*, involving a *Federal* agency, was a question of Fifth Amendment due process, whereas this is Fourteenth. Appellee attempts to cast doubt on *Brimson* by saying that it is an old case. It is, but its holding that Federal administrative agencies may not be given the contempt power has never been questioned. Indeed, this holding has been cited with approval in two recent court of appeals cases: *Chicago* v. *FPC*, 385 F. 2d 629 (D.C. Cir. 1967) (dicta); *Shasta Minerals* v. *SEC*, 328 F. 2d 285 (10th Cir. 1964) (dicta).

We submit: (1) that the large fine imposed and the potential 7½ month imprisonment bring this case under the rationale of *Frank, Bloom*[4] and *Duncan* v. *Louisiana,* 391 U.S. 145 (1968); (2) that the proliferation of offenses, together with the other procedural defects, constitute such an abuse of the contempt power as to violate due process; and (3) that the California statute violates the holding of *Brimson* that an administrative agency may not be invested with the contempt power "consistently with due process of law." For all of these reasons, this Court should agree to hear the case.

CONCLUSION

For the reasons set forth above and in the jurisdictional statements, it is respectfully urged that rehearing be granted and that, upon such rehearing, probable jurisdiction be noted..

Respectfully submitted,

ROBERT L. PIERCE
JOHN MACDONALD SMITH
ROBERT S. BOGASON
Southern Pacific Company
65 Market Street
San Francisco, California 94105

STEPHEN AILES
JAMES H. PIPKIN, JR.
Steptoe & Johnson
1250 Connecticut Avenue, N. W.
Washington, D. C. 20036
Counsel for Appellant

May 28, 1969

[4] The recitation above of the procedural shortcomings of the agency contempt proceeding is the best explanation of why the statement in *De Stefano* (392 U.S. 631) limiting retroactivity of *Bloom* should not be extended to this case. The procedural safeguards and judicial restraint which preserve the basic elements of fairness in judicial contempt proceedings (even without a jury) are not present in an administrative proceeding such as the present one.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

ROBERT L. PIERCE
Counsel for Appellant

Certificate of Service

I, Robert L. Pierce, one of the attorneys for Southern Pacific Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify, pursuant to Rule 33(3)(b) of the Revised Rules of the Supreme Court of the United States, that on the 28th day of May, 1969, I served a copy of the foregoing petition for rehearing as follows:

On all counsel of record for the California Public Utilities Commission, Peter E. Mitchell, William M. Bennett, A. W. Gatov, William Symons, Jr., and Fred P. Morrissey, as members of, and constituting said Commission, at the offices of the Commission, California State Building, San Francisco, California 94102; Thomas C. Lynch, at Fifth Street and Capitol Mall, Sacramento, California; John J. Ferdon, at 850 Bryant Street, San Francisco, California; Keith C. Sorenson, at Hall of Justice and Records, Redwood City, California; and Louis P. Bergna, at 190 W. Hedding, San Jose, California, by mailing a copy, in a duly addressed envelope, first class, postage prepaid, to each such party.

Dated this 28th day of May, 1969.

ROBERT L. PIERCE
Counsel for Appellant

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

SOUTHERN PACIFIC COMPANY *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 1050. Decided May 5, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted.